No. 10978

In The United States
Circuit Court of Appeals
For the Ninth Circuit

MURRELL F. HAID,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BERTIL E. JOHNSON,
Attorney for Appellant.

Office and Post Office Address:
505 Rust Building, Tacoma 2, Washington.

ANDERSON PTG. CO. TACOMA, WASH.

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STATEMENT CONCERNING JURISDICTION

The appellant was indicted (Tr. 2) on seven counts of violation of Section 76, Title 18, United States Code, and convicted on three counts and acquitted on four counts. The jurisdiction of the United States District Court is sustained by provisions of Title 28, Section 41, of the United States Code Annotated, and the jurisdiction of this Court by the provisions of Title 28, Section 723 (a), United States Code Annotated, and the rules promulgated by the Supreme Court of the United States pursuant thereto.

ABSTRACT OF THE CASE

The appellant was charged by indictment for seven violations of Section 76, Title 18, United States Code.

The jury, by its verdict, found the appellant guilty of Counts III, IV and V of the indictment and not guilty as to Counts I, II, VI and VII.

The indictment by Count I (Tr. 3) charged that the appellant between April 1, 1943, and December 31, 1943, did knowingly, wilfully, unlawfully and feloniously, and with intent to defraud Ruth McConkey and the United States of America, falsely assume and pretend to be an officer and employee of the United States of America, did demand and obtain from the said Ruth McConkey things of value, to-wit: employment and sums of money.

Count II (Tr. 3) charged that the appellant, in the months of January and February, 1944, did knowingly, wilfully, unlawfully and feloniously, with intent to defraud Gertrude Highmiller and the United States of America, falsely assume and pretend to be an officer and employee of the United States, acting under the authority thereof, did take it upon himself to act as such, in that he called upon and interviewed the said Gertrude Highmiller.

Count III (Tr. 4) charged that the appellant, between April 1, 1943, and December 31, 1943, did unlawfully, wilfully, knowingly and feloniously, with intent to defraud Elizabeth Mathwig and Ralph Mathwig and the United States of America, falsely assume and pretend to be an officer and employee of the United States, acting under authority thereof,

to-wit: Special Agent, Federal Bureau of Investigation, Department of Justice, and while acting as such did demand and obtain from them things of value, to-wit: drugs and certain sums of money.

Count IV (Tr. 5) charged that the appellant, on or about April 3, 1944, did knowingly, wilfully, unlawfully and feloniously, with intent to defraud C. H. Camfield and Laura Camfield and the United States of America, did falsely assume and pretend to be an officer and employee of the United States, acting under authority thereof, to-wit: a Special Agent, Federal Bureau of Investigation, and acting in such pretended character, did demand and obtain from them money in the sum of $100.00.

Count V (Tr. 5) charged the appellant, on or about August 3, 1943, did knowingly, wilfully, unlawfully and feloniously, with intent to defraud Everett Stuart and the United States of America, did falsely assume and pretend to be an officer and employee of the United States, acting under the authority thereof, to-wit: a United States Marshal, and acting in such pretended character, did then and there demand and obtain from him certain things of value, to-wit: automobile tire and tube without surrendering a ration certificate.

Count VI (Tr. 6) charged the appellant, during the month of April, 1943, did, with intent to defraud Mrs. Mary Lillibridge and the United States of America, falsely assume and pretend to be an officer and employee of the United States, acting under the authority thereof, to-wit: a Special Agent, Federal

Bureau of Investigation, Department of Justice, and acting in such pretended character, did demand and obtain from her the rental and occupancy of a residence and the installation and use of a telephone.

Count VII (Tr. 7) charged the appellant, on or about June 1, 1944, and July 31, 1944, with intent to defraud S. Irene Nelson and the United States of America, did falsely assume and pretend to be an officer and employee of the United States of America, acting under the authority thereof, to-wit: Special Agent, Federal Bureau of Investigation, Department of Justice, and did take it upon himself to act as such officer and employee in that he ordered and purchased from her a camera for use in his assumed and pretended office and employment.

EVIDENCE

The evidence, so far as this appeal is concerned, may be briefly stated as follows:

Murrell F. Haid was operating in the City of Olympia, Washington, during the period charged, as a private detective, under the name and style "Haid Bureau of Investigation." (Tr. 163). Prior to his residence in Olympia, he had been employed by the Norris Stamp Manufacturing Company of Los Angeles as a guard, and received for his services a certificate of meritorious conduct from the Auxiliary Military Police of the United States Army. (Tr. 163).

Prior thereto, he was employed as a guard by the United States Navy at Oceanside, California, the

Ryan Aircraft Corporation of San Diego, California, as a guard, and prior to that operated "Haid Bureau of Investigation," Wichita Falls, Texas. He is a married man, father of eight children (Tr. 164). His wife accompanied him on many occasions and was associated with him in his business.

The Government appellee here introduced in evidence, in support of its charges that he was employed by Mrs. Ruth McConkey, as a private investigator (Tr. 46) to make investigations and secure evidence in reference to the care and welfare of the minor children of her brother, Captain Mathwig. She testified, as did practically every other witness, that the appellant wore handcuffs, carried a gun, wore a badge which carried the word "investigation" (Tr. 36, 37, 39) and presented her with an identification card. She further testified that the appellant represented that he was an under cover man (Tr. 36), had been sent up here by the Government and usually worked until noon of each day at Fort Lewis; (Tr. 37) that he wore army clothes, not like her brother's, but her brother was a captain; appellant's clothes were gray with pinkish cast, army shirt, with short jacket like bus drivers wear (Tr. 37); that his private detective work was only a cover up (Tr. 38); that he went on a trip to Portland, where he secured the children, stopped a car by exhibiting his badge (Tr. 40) and on the way back from Portland stopped at a gas station at Woodland, where Everett Stuart was employed, and secured a tire and tube (Tr. 40). This is the same Everett Stuart named in Count VI of the indictment. She further testified

that she paid the appellant for his services in the investigation concerning the children $1225.64 (Tr. 42) and made him a loan of $100.00, which he never repaid (Tr. 42). During the direct testimony of Mrs. McConkey, the Court, over objection of appellant's counsel, permitted the said witness to testify (Tr. 45):

"Q. Now Mrs. McConkey, did you believe that he (appellant) was a Government employee?

"A. Yes, I would say I did.

"Q. Did your belief that he was a Government man in any way influence your transactions?

"A. Yes."

On cross-examination, Mrs. McConkey admitted that she hired him as a private detective (Tr. 46). Appellant, during his testimony, denied making any statement that he was employed by the Government in his conversations with Mrs. McConkey. The jury apparently disbelieved Mrs. McConkey, because it acquitted the appellant on Count I.

In support of its charge on Count II, the Government's (appellee's) witness, Mrs. Highmiller, testified that appellant called her on the 'phone, stating that someone had called him about her and suggested he send his card to Dr. Highmiller. (Tr. 89). He (appellant) called later and asked if he could come to the house to discuss some business with her and that it was arranged that he come out the next eve-

ning (Tr. 91). He came out, showed his gun and explained he had had it cut down on Government orders. (Tr. 91). She said, "Oh, then you are an F.B.I. man." and he (appellant) said, "No, don't misunderstand me, I am not an F.B.I. man," but he went on to say he was doing some sort of special work for the Government at Fort Lewis (Tr. 92). She further testified that appellant said he had been sent up by the Government (Tr. 92); that he did not ask her for anything and she paid him nothing (Tr. 93). The jury acquitted appellant on this count.

In support of Count III. The testimony on the part of the witness for the Government (appellee), Mrs. Elizabeth Mathwig and her son, Ralph Mathwig, testified that they met the appellant while he was making the investigation on the Mathwig children (Tr. 69, 77); that Ralph Mathwig was the brother of Ruth McConkey, and Elizabeth Mathwig was the mother of Ruth McConkey, Ralph Mathwig, and Capt. Mathwig (Tr. 68, 77).

When Haid first came to see Ralph Mathwig, he (Haid) said, "I am Haid of Haid's Detective Agency" (Tr. 69). On one occasion appellant showed a badge which had inscribed the words, "Issued by the Department of Justice" (Tr. 69). On another occasion, appellant was examining some drugs, because Margaret Mathwig was thought to be using narcotics, which he said he was going to take to Fort Lewis to have examined; that he had a right to take the drugs because he was a Government man (Tr. 70). On another occasion, appellant said, "He had re-

ceived word from Fort Lewis to pick up radios" (Tr. 71); that Ralph and his mother had a hospital building only partially completed, and that appellant said he knew Senator Wallgren and had connections in Washington and could assist in persuading the Government to take over the hospital building and complete it (Tr. 71-72). Haid was to receive nothing for his work, but was to be reimbursed for his expenses.

During the testimony of Ralph Mathwig, the Court, over the objection of appellant's counsel, permitted Ralph to testify as follows (Tr. 73):

"Q. The question is, Mr. Mathwig, what did you believe Mr. Haid to be?

"A. Well, after Mr. Haid asked me whether my sister had told me about whether he worked for the Government or not, and he showed me the badge, why I took him for a Government employee.

"Q. You took him for that?

"A. I took him for a Government employee.

"Q. Did you take him for any particular Government employee?

"A. By the badge, I took him he represented the F.B.I.

"Q. The words "Department of Justice" suggested that to you?

"A. Yes, sir.

"Q. Would you have let him take these drugs if you had not thought he was a Government man?

"A. No, I would not, because I figured we would be responsible.

"Q. If you had not thought him to be a government man, would you have entered into this agreement with Mr. Haid with respect to the proposal on the hospital?

"A. No, I don't think we would have."

Elizabeth Mathwig's testimony was very similar to that of her son, Ralph (Tr. 76-82), although she did add that she saw him (appellant) in Army clothes (Tr. 77); never saw his gun, but did see his handcuffs; on one occasion gave her some meat points; that he came and took the drug (Tr. 78); that she made a loan to him of $170.00, for which he gave a promissory note (Tr. 79).

During the testimony of Elizabeth Mathwig, the Court, over the objection of appellant's counsel, permitted her to testify as follows (Tr. 81):

"Q. At the time, Mrs. Mathwig—at the time Mr. Haid was coming out to your place, what did you believe was his occupation?

"A. That he was a Government man."

The appellant denied having made any representations to Ralph Mathwig or Elizabeth Mathwig that he was an officer or employee of the United States, and testified he tried to assist in the completion of the hospital building only as a friendly gesture, and because he had two children of his own in the service of the United States; that the money he received was for expenses only and that

the $170.00 was a loan for which he gave a promissory note (Tr. 168). He further testified that he never ever even showed Ralph Mathwig a badge with the inscription "Department of Justice," and that he never ever owned one with such inscription (Tr. 168); that he was asked to dispose of the drugs, which he did (Tr. 168); that he never ever told Ralph Mathwig he worked for the Government or was an F.B.I. (Tr. 169).

In support of Count IV, the Government (appellee) submitted testimony to the effect that Laura May Camfield and her husband, Clarence, were the grandparents of Wildabelle Sorrel and the mother and father of Walter Camfield. Walter Camfield was the father of Wildabelle Sorrel. Mrs. Sorrel had left Olympia and her whereabouts were unknown, and her parents and grandparents were endeavoring to locate her. Laura May Camfield had placed an ad in the Olympia papers offering a reward of $100.00 to anyone locating Mrs. Sorrel (Ex. 31). About a week later, the appellant came to her home, and introduced himself as "Mr. Haid" (Tr. 112), said he was from the Bureau of Investigation, showed his badge, and by reason of the manner in which he held it she only saw "Bureau of Investigation" on the lower part of it. He said he was a private detective, and Mrs. Camfield asked, "How many F.B.I.'s and private detectives are there in Olympia?" and he answered, "Three." (Tr. 113). After Haid (appellant) had questioned her about Mrs. Sorrel, Mrs. Camfield said "Does the F.B.I. and private detectives take cases of this kind?" and appellant answered, "Yes,

we do." (Tr. 113). Appellant was given the $100.00 in advance. Later in the conversation, Mrs. Camfield asked appellant, "How does the F.B.I. go about finding anyone like this?" and Appellant answered, "Oh, we have ways of finding them" (Tr. 114). Mrs. Camfield saw him on two occasions when he gave her some information concerning Mrs. Sorrel (Tr. 114). Mr. Camfield testified as follows (Tr. 117):

> "Q. What did you think Mr. Haid was?
>
> "A. Well, I wouldn't know what he was. I didn't know what he represented. He didn't tell us anything except Bureau of Investigation."

The Defendant showed by evidence that appellant had called on Walter Camfield and his wife, Bertha Camfield, handed them his card (Ex. A-1) (Tr. 145). They testified appellant did not say anything about being connected with the Government or with the Federal Bureau of Investigation (Tr. 145). Appellant called Mr. Walter Camfield and introduced himself as "Haid of Haid's Detective Bureau" (Tr. 146). Walter Camfield told appellant where he (appellant) could locate Laura May Camfield (Tr. 146). Appellant made several reports concerning Wildabelle Sorrel to Walter Camfield. The appellant denied having represented himself in any other manner than as a private detective (Tr. 169); that he first contacted Mrs. Camfield at the suggestion of Levy Johnson, the acting Prosecuting Attorney of Thurston County (Tr. 169). Levy Johnson testified that he had suggested that appellant contact the Camfield family (Tr. 150).

During the cross-examination of Walter Camfield, the Court permitted him to testify, over the objection of appellant's counsel, that he had talked to his mother, out of the presence of the appellant, and that during the conversation she had referred to appellant as "a detective of the F.B.I." (Tr. 147-148).

In support of Count V, the appellee submitted the testimony of Everett Stuart, who stated substantially that: he was a service station operator at Woodland, Washington; that on August 17, 1943, appellant stopped at his station and requested a tube and tire (Tr. 60); that there was one woman and two children in the car; that he said he had been to Oregon to seize the two children from their mother, who had taken them to Portland; that in case of emergency, the law enforcing officer could get tires (Tr. 60-61); that he had no tire certificate, but would secure one when he returned to Olympia; that he did send the certificate as he had promised; that appellant showed a badge similar to Ex. 2; that there was some writing on the badge, and all he noticed was "Bureau of Investigation" (Tr. 60); that he showed some credentials in a folder, but Stuart did not read them; that during the conversation Stuart said, "Well, I am going to let you have the tire since I don't believe Uncle Sam will put one of his own men in jail" (Tr. 61). Over objection of Appellant's counsel, the Court permitted Stuart to testify as follows: "Well, I am not going to state that he said he was a Government man right out, but he made indications to believe—I thought he was a Government man from his identifications from

the Bureau of Investigation" (Tr. 62); and again on further questioning by counsel for appellee, and over objection of appellant, the Court permitted Stuart to testify as follows:

"Q. Did you believe he was a Government man?

"A. I did.

"Q. What was your actual thought about it, what did you think he was?

A. I thought he was a marshal."

On cross-examination, Stuart testified, "I did not ask him and he did not tell me what special office he held. I was selling him a tire for which I got paid. Mine was a business transaction. He did everything he told me he would do, and the deal was wound up as far as I was concerned. I let him have those things to do what I could to get the children back. * * * I do not remember his stating definitely what office he held or what capacity of the office or who he worked for. All I know was that he was a law enforcement officer." (Tr. 65).

Appellant testified that he showed Stuart his credentials (Ex. A) and his badge (Ex. 2 or 3); told Stuart they had been to Portland to secure the children and that he had no ration certificate but would secure one when he reached Olympia, which he did (Tr. 166); that he made no statement that he was a United States Marshal or Special Agent of the Bureau of Investigation (Tr. 167). Other evidence submitted showed that appellant had gone to Port-

land to secure the children from their mother on instructions of the acting Prosecuting Attorney of Thurston County, and was authorized to say he was representing the Prosecuting Attorney's office (Tr. 150).

In support of Count VI, the testimony on behalf of the appellee showed that appellant on arriving from California went to the home of Mrs. Lillibridge in search of living quarters, and was informed by her that she had expected officers (Tr. 104); that Appellant stated he was in the employ of the Government, and that she (Mrs. Lillibridge) would be doing as much a service to the country in having him as in having Army officers (Tr. 104-105); that appellant represented his work was confidential; that he needed a telephone, and a telephone was secured; that he was interested in fingerprinting; that she believed him to be a member of the F.B.I., and that she arrived at the belief because he wore a uniform type of clothes, because of his conversation about investigations and Government assignments (Tr. 106). He said he was not a member of the F.B.I. but was working directly with them (Tr. 107).

The evidence showed that Mrs. Lillibridge had secured a telephone listing for appellant under "Haid's Detective Bureau" (Defendant's Ex. 18) (Tr. 176). The jury found appellant not guilty on this count.

In support of Count VII, the appellee called Irene Nelson as a witness, who testified that appellant came to her shop to purchase a camera, and in the course

of the conversation, appellant told her his work was F.B.I. Secret Service. Appellant asked her to hold the camera until his money came from Washington, D. C. She further testified that he came in later and said his check had not come, but would pay later, and she held the camera (Tr. 110).

Over the objection of appellant, the Court allowed Miss Nelson to testify that she believed he was an F.B.I. man or she would not have held the camera for two weeks (Tr. 110). Appellant admitted that he purchased the camera and paid for it in several payments, but denied he ever represented himself to be an F.B.I. The jury acquitted him on this count.

This statement of the case has been longer than was anticipated, but we feel that a full statement of the facts will well demonstrate the prejudice that must have arisen in the minds of the jury by reason of the errors committed by the District Court.

ASSIGNMENT OF ERRORS TO BE RELIED UPON

The appellant will rely upon the following assigned errors:

No. 1—Transcript 179.
No. 2—Transcript 181.
No. 3—Transcript 182.
No. 4—Transcript 183.
No. 5—Transcript 184.
No. 6—Transcript 185.
No. 9—Transcript 189.

ARGUMENT

Assignment of Error No. 1:

The Court erred in admitting in evidence over the objection of the defendant (appellant), and erred in refusing to grant the motion to strike the testimony of the witness Stuart on the grounds that the same was incompetent and opinion evidence and not within the issues of the indictment in Count 5.

Assignment of Error No. 1 (Tr. 179) is based upon the contention that the Court erroneously permitted the witness Stuart to give his opinion of what he believed the appellant to be.

The testimony in reference to assignment of error is found on pages 62-63 of the transcript.

The facts demonstrate that appellant, while trying to secure a tire and tube, stated he was a law enforcement officer; that he had secured the children from the mother in Portland, who had taken them from Olympia, Washington, and that he showed his credentials and badge, which bore the inscription "Haid's Bureau of Investigation"; but that Stuart only saw "Bureau of Investigation." There was no testimony whatever that appellant represented himself to be a United States Marshal. He was specifically charged in Count V of having falsely represented himself to be a United States Marshal. Nothing from the facts testified to suggested he was pretending to be a United States Marshal until the Court erroneously allowed him (Stuart) to testify he (Stuart) believed him to be a United States Marshal.

Assignment of Error No. 2 reads as follows:

That the District Court erred in admitting in evidence over the objection of the defendant, that the same was incompetent and opinion evidence the testimony of the witness Ralph Mathwig:

Assignment of Error No. 2 is found at page 181 of the Transcript and the testimony in reference thereto is found on pages 68 to 76 inclusive of the Transcript.

Here again the Court, over objection, permitted the witness to testify in answer to the inquiry "What did you believe Mr. Haid to be" that he (the witness) believed him to be working for the Government as a government employee, and represented the F.B.I.

Assignment of Error No. 3 reads as follows:

The District Court erred in admitting in evidence over the objection of the defendant and erred in denying the motion to strike testimony of the witness Elizabeth Mathwig:

Assignment of Error No. 3 is found at page 182 of the Transcript and the testimony in reference thereto is found on pages 76 to 84 of the Transcript.

Here again the witness, Elizabeth Mathwig, was allowed to testify as to her opinion as to whom she believed the appellant to be, when she stated: "Well, he gave us to understand that he was a Government man."

Assignment of Error No. 4 reads as follows:

The District Court erred in admitting in evidence over the objection of the defendant, the same as incompetent and calling for a conclusion the testimony of Elizabeth Mathwig.

Assignment of Error No. 4 is found on page 183 of the Transcript and the testimony in reference thereto is found on pages 76 to 84 of the Transcript.

Here again the Court permitted the witness, Elizabeth Mathwig, to state her opinion when she testified, "I believed that he was a Government man."

Assignment of Error No. 5 reads as follows:

The District Court erred in admitting in evidence over the objection of the defendant, the same was incompetent and calling for conclusion of the testimony of the witness Clara Gross:

Assignment of Error No. 5 is found on page 184 of the Transcript and the testimony in reference thereto is found on pages 118 to 120 inclusive of the Transcript.

The evidence of Mrs. Gross was cumulative. No charge was laid in the indictment that Appellant had misrepresented himself to her, but she was permitted to testify in answer to the question: "I want to show you Plaintiff's Exhibit 2, and ask you if that is the badge or similar badge to the one he showed you at that time?" Answer: "Well, I couldn't say, but it looks like it. I saw Bureau of Investigation, and I thought it was Federal Bureau of Investigation. It looked like it to me, it had on it Federal Bureau of Investigation."

Because Assignments of Error 1, 2, 3, 4, and 5 involve the same principle of law, we shall discuss them together.

As has been noted, all of the testimony which was, in our opinion, erroneously admitted, was to the effect that in the opinion of the various witnesses the appellant was a Government employee, a member of the F.B.I., or a United States Marshal. It was for the jury to determine on the facts what representations or misrepresentations were made, and it was only the jury's providence to decide from the facts whether or not the appellant had misrepresented himself to be what he was not; namely, a Government employee, a member of the F.B.I., or a United States Marshal. The constant reference to the opinions of the various witnesses where supported by the facts or not, was prejudicial error.

In the case of the witness Stuart (Count V), no mention of a United States Marshal was made until the question was put and he answered by giving his opinion. He saw only "Bureau of Investigation" on the badge. If any conclusion of misrepresentation could have been arrived at, it would be that Haid misrepresented himself to be a representative of the Federal Bureau of Investigation.

But he was not charged with that misrepresentation. He was charged with misrepresenting himself to be a United States Marshal, and so he, the witness, supplies, by his own opinion, the missing link—that he believed Haid to be a United States Marshal.

So in the matter of Mrs. Elizabeth Mathwig. She testified (Tr. 82) that Mr. Haid never told her directly he was a Government employee, an F.B.I., or a Marshal; that she knew he was a private investigator or special investigator (Tr. 82); that she formed an opinion that Appellant was a Government man (Tr. 82), and the Court allowed her to express that opinion. That question was one for the jury to determine; certainly not the witness.

He was charged in Count III (Tr. 4) with misrepresenting himself to be a Special Agent of the Federal Bureau of Investigation.

Ralph Mathwig clearly was expressing his own opinion when he stated (Tr. 73): "I took him to represent the F.B.I." Nowhere are the words "F.B.I." used, except as his own opinion.

> "It is a fundamental principle of the law of evidence as demonstrated by our Courts, both in civil and criminal cases, that the testimony of witnesses upon matters within the scope of the common knowledge and experience of mankind, given upon the trial of a cause, must be confined to statements of concrete facts within their own observation, knowledge and recollection; that is, facts perceived by the use of their own senses, as distinguished from their opinions, inferences, impressions, and conclusions drawn from such facts. Generally speaking, the opinion or conclusions of a witness upon a fact or facts in issue is incompetent and inadmissible, although there are some exceptions to this rule as well settled as is the rule itself, where the issues involve facts and matters calling for special skills and study, or where the facts in controversy are incapable of being detailed and

described so as to give the jury an intelligible understanding concerning them."

20 *Am. Jur.*, Page 634, Section 765.

"It is a familiar rule without exception, that the opinion of a witness not founded on science or in relation to any special business, art or trade, requiring peculiar knowledge, but given purely as the witness' theory concerning an issue of morals or duty is inadmissible, whether such opinion be by a professional or non-professional witness."

Rogers Expert Testimony, Page 32, Sec. 11.

The issue for the jury to determine in this case was: Did the appellant misrepresent himself to be the particular officer or employee charged in the various counts of the indictment?

What he said or did could be accurately detailed to the jury. They were not incapable of being detailed and described to the jury.

"A witness should state facts, and the conclusions to be drawn from them rests with the jury."

Ventress vs. Smith, 35 U. S. 161, 9 L. Ed. 382.

The general rule is well stated in 11 R.C.L. 565:

"It is for the jury to determine the truth as to the evidential facts from the testimony of the witnesses, and to draw the conclusion deducible from such evidential facts by the exercise of their own judgment and reasoning powers. As to conclusions upon matters within the scope of common knowledge and experience, the jury is a tribunal well fitted to perform this task. To

permit a witness to state to the jury his opinions as to the conclusions to be drawn from the concrete facts which he has observed would be to invade the peculiar province of the jury; and therefore conclusions of that character are universally excluded. Thus, a question is improper if it requires the witness to judge of the probative effect of a fact, as, for example, whether he knows of anything pointing to the guilt of anyone other than the accused, or whether he has discovered any evidence connecting the accused with the crime, or whether he said anything which led another person to believe he was going to execute a certain instrument, or whether he ever admitted to anyone that certain land did not belong to him. Nor may the witness be allowed to give his conclusion as to matters exposed to the view of the jury and as to which the jury is fully capable of forming their own opinion; as, whether a photograph in evidence resembles the witness. Still more repugnant to our law of evidence is the witness's mere unsupported supposition or belief as to some fact in controversy, his opinion on a question of law or on that which involves a question of law, or the opinion expressed by, or shown by the actions of, some person not a witness." 11 R.C.L. 565-567.

The rule is particularly well discussed in reference to agency in 90 A.L.R. 749-758, and a number of cases are cited therein.

"The general rule that facts and not conclusions should be stated is a wise and salutory one, and cannot be too strictly followed. It tends to prevent fraud and perjury, and is one of the strongest safeguards of personal liberty and private rights. Whenever it is doubtful whether the case falls under the rule or under one of its exceptions, the wise course is to place it under the rule."

Fred J. Keisel & Company vs. Sun Insurance

Office of London, 88 Fed. Rep. 243-249 (C.C.A. 8);

St. Louis-San Francisco Railway Co. vs. Barton, 18 Fed. (2d) 96.

"Where an issue, its subject matter, and facts which condition its decision are single and open to the common understanding, so that no special skill is required to form a correct judgment upon it, the opinions of witnesses regarding it are inadmissible."

Lake vs. Shenango Furnace Co., 160 Fed. 87;

Manufacturers Accident Indemnity Co. vs. Dorgan, 58 Fed. 945 (C.C.A. 8).

Testimony as to whether a particular person was agent held properly excluded as conclusion.

Fuller Process Co. vs. Texas Company, 16 Fed. (2d) 108 (C.C.A. 8).

In the case of *United States vs. O'Connell,* 43 Fed. (2d) 1005, the Court excluded the testimony of a Customs Officer that person was known to him as a bootlegger. The Court held that such testimony could not be received in any Court as a statement of fact on which a judicial declaration might be made.

The writer of this brief has searched diligently to find a case with facts similar to the facts in this case, but he has not been able to discover such a case. However, the law applicable to the facts is well demonstrated in the citations above set forth. No other conclusion can be reached here but that the Court erred in allowing the witnesses to testify as to their opinion of the official capacity that the Appellant here represented himself to be. Such error was pre-

judicial, and did not happen in one instance, but in at least five or six instances, and particularly in the matter of the testimony of Clara Gross. No charge whatever was laid in the indictment concerning any representations to Mrs. Gross, and the accumulation of all these witnesses testifying to their opinion and their belief as to what office or what officer Mr. Haid was certainly could not help but prejudice the minds of the jurors.

Assignment of Error No. 6 reads as follows:

The District Court erred in admitting in evidence, over the objection of the defendant that the same was incompetent and hearsay, the testimony of Walter Camfield.

This assignment of error is set forth in full in the Transcript, Pages 185-186, and the testimony in reference thereto is found at Page 147-148 of the Transcript.

Walter Camfield was called as a witness for the defendant and testified that when Haid called him on the 'phone, he, Haid (the appellant herein), introduced himself as "Haid of Haid's Detective Bureau"; (Tr. 146) that Camfield was the father of Wildabelle Sorrell and the son of Laura May and Clarence Camfield; that he had sent the appellant to his mother, Laura May Camfield, concerning paying the reward (Tr. 146), and that the appellant had made several reports to him about the progress of the investigation. On cross-examination, over objection of the appellant, the Court permitted Walter Camfield to testify that his mother, Laura Camfield, out of the pres-

ence of the appellant, referred to Mr. Haid as "a detective of the F.B.I." (Tr. 147-148).

This was the rankest kind of hearsay. The appellant was not present during the conversations between Walter Camfield and his mother, Laura May Camfield, and yet the Court permitted Walter Camfield to testify as to what reference she (Mrs. Laura Camfield) made concerning appellant, to-wit: "that he was a detective of the F.B.I."

The law on this question is well settled:

> "The general rule is that hearsay evidence is inadmissible."
>
> 20 *Am. Jur.*, Page 403, Sec. 454.

There are certain exceptions such as dying declarations, statements against interest, original records lost or destroyer, confessions *Res Gestae*, expert opinion evidence and evidence to prove the age or race of an individual and boundaries, but the evidence admitted in this case is not within any of the exceptions of the rule.

Justice Marshall clearly set forth the reason for the hearsay rule in the case of *Mima Queen vs. Hepburn*, 7 Cranch 295; 3 L. Ed. 348, in which he states at page 350 of 3 L. Ed., as follows:

> "It was very justly observed by a great judge that 'all questions upon the rules of evidence are of vast importance to all orders and decrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.'

"One of these rules is, that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

"To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases of boundary. There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact.

"It will be necessary only to examine the principles on which these exceptions are founded to satisfy the judgment that the same principles will not justify the admission of hearsay evidence to prove a specific fact, because the eye witnesses to that fact are dead. But if other cases standing on similar principles should arise, it may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule: the value of which is felt and acknowledged by all.

"If the circumstances that the eye witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained."

The law is so well settled and the error so pro-

nounced, it seems unnecessary to cite all of the cases on this subject, so we will content ourselves with citing only some of the outstanding cases:

Elliott vs. Pearl, 10 Pet. 412, 436; 9 L. Ed. 475;

James Donnelly vs. United States, 228 U. S. 243, 708; 57 L. Ed. 820, 1035; 33 S. Ct. 449, 1024; Ann. Case 1913 E 710;

Lucas vs. United States, 163 U. S. 612; 41 L. Ed. 282, 16 S. Ct. 1118;

United States vs. LaFavor, 96 Fed. (2) 425 (C.C.A. Wash.);

Harris vs. United States, 70 Fed. (2) 889 (C.C.A. 4th);

Harrison vs. United States, 200 Fed. 662 (C.C.A. 6);

Hart vs. United States, 240 Fed. 911 (C.C.A. 2);

Nicols vs. United States, 72 Fed. (2) 780 (C.CA. 3).

It might be argued by the appellee herein that the evidence of Walter Camfield above referred to was error, but not prejudicial error. The whole question in this case is, "What did the appellant represent himself to be?" That was a question solely for the jury to answer from facts, not opinions or hearsay evidence, and the statement of Laura Camfield made to her son was prejudicial.

As was said by the Supreme Court of the State of Washington in the case of *State of Washington vs. Rudolph Chester Robinson*, 124 Wash. Dec. 868, at page 874:

> "It is highly improper for courts, trial or appellate, to speculate upon what evidence appealed to a jury. Jurors and courts are made up of human beings, whose condition of mind cannot be ascertained by other human beings. Therefore, it is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors. The state attempts to safeguard the life and liberty of its citizens by securing to them certain legal rights. These rights should be impartially preserved. They cannot be impartially preserved if the appellate courts make of themselves a second jury and then pass upon the facts. One of the first propositions of the orderly administration of the law is that a defendant, either guilty or innocent, shall be accorded a fair trial. The fact that this or the trial court may consider the accused to be guilty in no wise lessens the court's duty to see that he has a fair trial. A fair trial implies among other things that the court exclude all evidence that has no material bearing on the case."

This case was decided April 8, 1946.

The District Court erred in refusing to grant the Defendant's (Appellant's) motion for a new trial.

Assignment of error No. 9 reads as follows:

> "That the District Court erred in refusing to grant the Defendant's motion for new trial" (Tr. 189).

We submit that the errors complained of in our various Assignments of Error were all important, and that the admission of evidence as hereinabove discussed was prejudicial to the Defendant (Appellant), and deprived him of a fair trial, and the District Court should have granted the motion for a new trial.

CONCLUSION

As has hereinbefore been stated, at least five or six witnesses were allowed to testify as to what they believed, or what their opinion was, and what their conclusions were as to what particular office or employment Mr. Haid held with the Federal Government.

The question that the jury had to determine was whether or not there had been any misrepresentation, and the statement by the witnesses of their conclusions and opinions was in fact a substitution of the judgment of the jury.The witnesses had stated the facts, their observations, and the representations that were made by the Appellant. It was for the jury to determine the truth, and to draw the conclusions deducible from such evidential facts by the exercise of their own judgment and reason.

We therefore submit that the Court was in error in admitting the opinions of the witnesses and the hearsay testimony of Walter Camfield, and that the judgment should, therefore, be reversed, and a new trial granted.

Respectfully submitted,

BERTIL E. JOHNSON,

Attorney for Appellant.

APPENDIX

ASSIGNMENTS OF ERROR

(See Index for Pages)

1. The District Court erred in admitting in evidence, over the objection of the defendant, and erred in refusing to grant the motion to strike the testimony of the witness Stuart on the grounds that the same was incompetent and opinion evidence and not within the issues of the indictment on Count 5.

> "Q. (by Mr. Sager): Did he say anything to you about being a Government man?
>
> "A. Well, I am not going to state that he said he was a Government man right out, but he made indications to believe—I thought he was a Government man from his identifications from the Bureau of Investigation. That was the first anything has been said about the Government.
>
> "MR. JOHNSON: If the Court please, I move that be stricken and I object to the question, for the reason that we are charged in the Indictment with having represented to be a United States Marshal, and obviously, in view of the answer now of the witness, that is not in conformity with the charge with which we have been charged.
>
> "MR. SAGER: We will get to that.
>
> "MR. JOHNSON: I think we are entitled to have strict proof on it.
>
> "THE COURT: Your motion will be denied at this time.
>
> "MR. JOHNSON: Exception.

"Q. Did you believe he was a Government man?

"A. I did.

"MR. KIBBE: Now, I move that be stricken, what he believed. What Mr. Haid had told him is the only thing that would justify that, what he believed. He might believe I was President of the United States and I would not be.

"THE COURT: I think the rule would be different, Mr. Kibbe, in this particular charge on this count—where this is one of the counts. I shall have to overrule your objection and allow you an exception.

"Q. What was your belief as to what capacity and what he was acting as, as a Government man?

"A. Well, my belief, if I seen a star, would mean a man was a law enforcement officer, and naturally bound to be a marshal or police of some kind. I think anybody with any common reason would think the same thing.

"Q. What was your actual thought about it, what did you think he was?

"A. I thought he was a marshal.

"MR. JOHNSON: May my objection go to all this testimony?

"THE COURT: Yes.

"A. (Continuing): From the reading on his badge, and that is all I paid any attention to, that part of the badge convinced me in selling the tire in truth he was a Government man.

"Q. What did you say?

"A. I figured he was a marshal, naturally."

2. The District Court erred in admitting in evidence over the objection of the defendant, that the same was incompetent and opinion evidence the testimony of the witness Ralph Mathwig:

"Q. (by Mr. Sager): Mr. Mathwig, what did you believe of Mr. Haid's capacity—or—

"MR. JOHNSON: If the Court please, object to that, on the ground that it is incompetent and not the proper basis on which—that the testimony is purely a matter of opinion, and the ultimate question to determine is what the facts were, and that matter is for the jury to determine.

"THE COURT: Yes, the jury will finally have to determine the question of whether or not this person parted with any property or anything on the belief and on the representation of—what he believes of course is not conclusive of what the factual matter is or was. However, he may answer the question and exception allowed.

MR. JOHNSON: Exception.

"Q. The question is, Mr. Mathwig, what did you believe Mr. Haid to be?

"A. Well, after Mr. Haid asked me whether my sister had told me about whether he worked for the Government or not, and he showed me the badge, why I took him for a Government employee.

"Q. You took him for what?

"A. I took him for a Government employee.

"Q. Did you take him for any particular Government employee?

"A. By the badge, I took him he represented the F.B.I.

"Q. The words 'Department of Justice' suggested that to you?

"A. Yes sir.

"Q. Would you have let him take these drugs if you had not thought he was a Government man?

"A. No, I would not, because I figured we would be responsible."

3. The District Court erred in admitting in evidence over the objection of the defendant and erred in denying the motion to strike testimony of the witness Elizabeth Mathwig:

"Q. (by Mr. Sager): Did Mr. Haid tell you why he was examining the drugs?

"A. Well, he gave us to understand that he was a Government man.

"MR. JOHNSON: I move that be stricken.

"Q. Well, what did he say?

MR. JOHNSON: Just a moment.

"A. That is so long ago—

"MR. JOHNSON: Just a minute, Mrs. Mathwig.

"THE COURT: I will overrule your objection, Mr. Johnson.

"A. I couldn't tell you the exact words.

"MR. JOHNSON: Exception."

4. The District Court erred in admitting in evidence over the objection of the defendant, the same as incompetent and calling for a conclusion the testimony of Elizabeth Mathwig.

"Q. (by Mr. Sager): What did you believe as to Mr. Haid's occupation or employment?

"MR. JOHNSON: Just a minute.

"A. Well—

"MR. SAGER: Just a moment.

"MR. JOHNSON: There is no testimony here whatsoever that Mr. Haid made any representation to Mrs. Mathwig concerning his being connected with the Government in any degree, and certainly now she may have formed an impression of what somebody else may have told her. That no, is not competent evidence and is objected to on that ground.

"THE COURT: Of course, she will understand —the witness understand what she believed or what she thought at that time, and not what she thinks now. The question is limited to that extent. The objection will be overruled and exception allowed.

"Q. At the time, Mrs. Mathwig—at the time Mr. Haid was coming out to your place, what did you believe was his occupation?

"A. That he was a Government man.

"Q. Would you have permitted him to take the drugs if you had not believed him to be a Government man?

"MR. JOHNSON: Object to that.

"A. No, I wouldn't.

"THE COURT: Whenever there is an objection, you wait.

"MR. JOHNSON: Object to this on the basis there is no testimony now in evidence, so far as Mrs. Mathwig is concerned, of any impression she received from Mr. Haid himself or any misrepresentations on his part as to the fact that he was not—that he was employed by the Government in any confidential capacity.

"THE COURT: Objection will be overruled, Mr. Johnson. Exception allowed.

"Q. Would you have entered into this arrangement with him for the attempt to reconvert the hospital if you had not thought he was a Government man?

"MR. JOHNSON: Object to that, if the Court please, on the same ground.

"THE COURT: Same ruling.

"A. No, you wouldn't do this to a perfect stranger.

"Q. Would you have loaned him the $170 on the note?

"A. No, I wouldn't, neither.

"MR. JOHNSON: Same objection.

"THE COURT: Same ruling."

5. The District Court erred in admitting in evidence over the objection of the defendant, the same was incompetent and calling for conclusion, the testimony of the witness Clara Gross:

"Q. (by Mr. Sager): I want to show you

Plaintiff's Exhibit 2 and ask you if that is the badge or similar badge to the one he showed you at that time?

"A. Well, I couldn't say, but it looks like it. I saw Bureau of Investigation, and I thought it was Federal Bureau of Investigation. It looked like it to me, it had on it Federal Bureau of Investigation.

"MR. JOHNSON: Object as calling for a conclusion.

"THE COURT: Objection will be overruled.

"MR. JOHNSON: Exception."

6. The District Court erred in admitting in evidence over the objection of the defendant that the same was incompetent and hearsay, the testimony of the witness Walter Camfield.

"Q. (by Mr. Sager): Now, did you ever talk to your mother about this matter of Mr. Haid?

"A. Naturally I would.

"Q. How did she refer to Mr. Haid?

"A. How did she refer to him?

"MR. JOHNSON: I object to that as being purely hearsay.

"THE COURT: Objection will be overruled.

"MR. JOHNSON: How this mother referred to him out of the presence of the defendant?

"THE COURT: Objection will be overruled, Mr. Johnson, exception allowed.

"THE WITNESS: Shall I answer that question?

"THE COURT: Yes.

"A. Okeh, she would always refer to him as a detective of the F.B.I.

* * * * * * *

"Q. I mean, Mr. Haid was not present when your mother made that statement.

"A. No."

9. The District Court erred in refusing to grant the defendant's motion for a new trial.